No. 78-825

In the Supreme Court of the United States

OCTOBER TERM, 1978

BERTIL A. GRANBERG, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
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Washington, D.C. 20530

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Petitioner seeks review of his conviction of filing false employment tax returns on the ground that the trial court erred in admitting certain exhibits into evidence.

After a jury trial in the United States District Court for the Western District of Washington, petitioner was convicted on two counts of filing false employment tax returns for the quarters ending September 30, 1973, and March 31, 1974, in violation of 26 U.S.C. 7206(1). The trial court sentenced him to concurrent one-year terms on each count and a fine of $5,000. The court of appeals affirmed (Pet. App. A-1 to A-4).

1. Petitioner contends (Pet. 5-6) that the trial court erred in admitting the originals of the front bottom half of the employment tax returns in question (Govt. Exs. 1 and 3) and photocopies of the front of the top portion of those

returns (Govt. Exs. 1-A and 3-A)[1] because the partial originals contained information not reflected in the photocopies. In petitioner's view, the notations on the originals could have disclosed information that would have been beneficial to his defense.

The pertinent facts are as follows: At trial, Internal Revenue Service personnel explained that an employer's quarterly federal tax return consists of two parts. The front of the top portion has spaces for a list of employees by name, social security number, and gross wages, while the back of the top portion contains instructions to complete the entire return. The front bottom portion is for summary information with respect to total wages subject to employment taxes and total employment taxes. The back of the bottom part is used for information regarding employment tax deposits made by the employer (Tr. 86-87; 158-159). In the normal course of processing such a return, the Internal Revenue Service detaches the top portion and forwards it to the Social Security Administration. IRS retains the bottom portion (Tr. 89, 168). Social Security microfilms the front of the top portion and destroys the original (Tr. 154).[2]

Agent Paul Miyahara testified that on April 22, 1974, he received the original Burien Garden Apartments return for the third quarter of 1973 from Revenue Officer

[1]Petitioner was the operator of the Burien Garden Apartments. The tax returns in question, filed by petitioner, did not report the wages of several of Burien's employees and thus understated the total wages and the tax liability by several thousand dollars (Pet. App. A-1 to A-2).

[2]After petitioner objected to admission of Government Exhibit 1, counsel for the government informed the court that he had advised petitioner's counsel "weeks ago" that the original of the IRS-retained copy would be introduced, that the top portion had been sent to Social Security, and that petitioner's counsel agreed to accept a photocopy rather than have the prosecution obtain the top portion from Social Security (Tr. 85).

Einfeld. Miyahara examined the entire return and photocopied all portions of the return that contained any of petitioner's notations (Tr. 158-161). He did not photocopy the reverse side of the return because he observed no notations on that part (Tr. 161). The Burien Garden 1974 first quarter return was received and copied in the same manner and to the same extent (Tr. 162-164). In accordance with Internal Revenue Service policy,[3] Miyahara forwarded the returns to the Internal Revenue Service Center for processing (Tr. 194).

The decision below correctly upheld the trial court's admission of the exhibits into evidence. Rule 1003 of the Federal Rules of Evidence provides that duplicates[4] are admissible to the same extent as originals, unless a genuine question is raised as to the authenticity of the original or it would be unfair to admit the duplicates under the circumstances.

Petitioner did not raise any question about the authenticity of the original at trial (Tr. 106, 110-114, 172-177, 184, 201).[5] He nevertheless claims (Pet. 11) that a genuine question of authenticity exists because "the defendant had not at trial seen the top half of the forms 941 as they were filed." Petitioner's complaint is that the reverse side of the upper portion of the form was not part of either exhibit. But as the court of appeals observed (Pet. App. A-3), that portion of the form consists only of printed instructions and contains no place for the taxpayer to supply information. At all events, Agent Miyahara testified that he examined the entirety of the

[3]5 Administration, Int. Rev. Manual (CCH) par. 9326.4(2), p. 28,089.

[4]As defined by Rule 1001(4), "A 'duplicate' is a counterpart produced * * * by means of photography * * *."

[5]Petitioner first raised a challenge to the authenticity of the documents in his post-trial motion for judgment of acquittal.

documents when the copies of the front were made and that there were no notations on the upper portion of the reverse side.

Petitioner's claim (Pet. 15) that the complete originals of the returns would show a reference to "Timber Creek" (another entity controlled by petitioner) is unsupported by the record. In rejecting this contention, the court of appeals correctly pointed out (Pet. App. A-3) that petitioner gave no such testimony at trial and that, in any event, "it is hardly likely that a taxpayer would use the part of the form devoted entirely to printed instructions as the place to insert such vital information as the * * * [petitioner] implies was done here." Petitioner has never shown that there was any genuine question as to the authenticity of the original returns or of the copies made from those returns.

Rule 1004(1) of the Federal Rules of Evidence provides that the original of a writing is not required and that other evidence of the contents of a writing is admissible if all the originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith. The evidence showed that the top parts of the originals were destroyed in routine processing by the Social Security Administration, after having been microfilmed. Thus, there is no evidence of bad faith in this case. The sufficiency of the foundation for the admissibility of secondary evidence lies within the discretion of the trial court. *Ellis* v. *United States*, 321 F. 2d 931 (9th Cir. 1963). In these circumstances, the trial court properly exercised its discretion in admitting the copies into evidence. *United States* v. *Morgan*, 555 F. 2d 238 (9th Cir. 1977).[6]

[6]The authorities upon which petitioner relies (Pet. 10, 12) are distinguishable. In *Mullican* v. *United States*, 252 F. 2d 398 (5th Cir. 1958), the court held copies inadmissible because of a lack of proper authentication of official records under Rule 44, Fed. R. Civ. P., and Rule 27, Fed. R. Crim. P. *Toho Bussan Kaisha, Ltd.* v. *American Pres. Lines, Ltd.*, 265 F. 2d 418 (2d Cir. 1959), turned on a failure to lay a sufficient foundation under New York and federal business entry statutes. Finally in *United States* v. *Alexander*, 326 F. 2d 736 (4th Cir. 1964), no reason was given for failure to produce the original.

2. Finally, petitioner argues (Pet. 3, 7) that the trial court erred in allowing Helen Howe, a defense witness, to answer the prosecutor's question whether she had refused to talk to government counsel during a trial recess. Over objection, she was allowed to answer that she came to testify for petitioner (Tr. 620). The obvious purpose of the question, as the court of appeals pointed out (Pet. App. A-3), was to demonstrate the witness's bias in favor of petitioner. Her response to the question was relevant to that purpose. It is well settled that counsel is entitled to considerable leeway in cross-examination (*United States* v. *Birnbaum*, 337 F. 2d 490 (2d Cir. 1964)), and the extent of cross-examination rests largely in the discretion of the trial court (Rule 611(b), Fed. R. Evid.; *United States* v. *Drake*, 542 F. 2d 1020 (8th Cir. 1976), cert. denied, 429 U.S. 1050 (1977)). There is no showing that the trial court abused its discretion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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